No. 10,333

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor and Mount Gaines Mining Company (a corporation), Debtor,

Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

Appellees.

BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Codes and Statutes

Texts

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BRIEF FOR APPELLANT.

STATEMENT AS TO PLEADINGS AND JURISDICTION.

This proceeding was commenced by James P. Hart, as the duly appointed, qualified and acting trustee of the International Mining and Milling Company, a corporation, Debtor, in proceedings for reorganiza-

tion of a corporation, No. A-34-A, and the Mount Gaines Mining Company, a corporation, Debtor, in proceedings for reorganization of a corporation, No. A-35-A, under Chapter X of the Bankruptcy Act of the United States then pending in the District Court of the United States, in and for the District of Nevada.

A petition was filed in the District Court of the United States, in and for the District of Nevada, asking for an order to show cause directed to the California Pacific Title & Trust Company, the Title Insurance and Guaranty Company, the Humphrey Estates, Inc., Harry Lee Jones, Arthur J. Edwards, D. R. Gustaveson, James S. Hazen and Persis E. Hazen, Byron Halverson and Joseph J. Mueller, why they failed and refused to convey to the Mount Gaines Mining Company the title to three-fourths interest in certain mining properties mentioned and set forth in the Lease and Option given by J. W. Humphrey to Carl W. Yates and J. E. Binns on December 16, 1933, the predecessors in interest of the California Pacific Title & Trust Company and the Title Insurance & Guaranty Company.

The petition shows the following facts:

That on the 16th day of December, 1933, J. W. Humphrey, the legal owner of certain mining claims situated in Mariposa County, State of California, made and executed a lease for ten years for the said mining claims to Carl W. Yates and J. E. Binns and at the same time included in said lease to the said Yates and Binns an option to purchase an undivided

three-fourths interest in all of said mining claims for the sum of $50,000.00 at any time within the period of the lease or any extension thereof provided the lease should be in force and effect.

The option further provides:

> "Said owner, for and by the considerations and agreements herein therefore grants unto the Lessees an option to purchase an undivided three-fourths (¾) interest in said mine, property and all appurtenances thereof for the sum of Fifty Thousand Dollars ($50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars ($10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars ($10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars ($50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth (¾) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned."
>
> (Tr. p. 23.)

That on or about the 1st day of December, 1934, said lease and option was assigned to the Mount Gaines Mining Company, one of the debtors in reorganization, and the said Mount Gaines Mining Company thereupon entered into the possession of all of the said mining claims under said lease and option and ever since said time has been, and now is, in the sole and exclusive possession of all of said mining claims.

That while the Mount Gaines Mining Company was in possession of all of said mining claims, by virtue of said lease and option, the Superior Court of the State of California, in and for the County of Mariposa, in an action therein pending entitled J. W. Humphrey, Plaintiff, vs. Mt. Gaines Metals, Inc., et als., by its decree duly made February 21, 1936, directed said J. W. Humphrey to convey the legal title to all of said mining claims to the California Pacific Title & Trust Company, as trustee of such legal title and in trust for W. H. Holcomb, Harry Lee Jones, and C. F. Humphrey, as tenants in common and the said J. W. Humphrey did so convey the said legal title to said mining claims to the California Pacific Title & Trust Company, as trustee.

That on or about the 25th day of May, 1937, the Mount Gaines Mining Company duly and regularly served a written notice upon C. F. Humphrey, W. H. Holcomb, Harry Lee Jones and the California Pacific Title & Trust Company, Trustee, that the Mount Gaines Mining Company,

"hereby elects to exercise, and does exercise, the option to purchase mentioned in the above named agreement."

Also, the said notice directed the said C. F. Humphrey, et als., to apply three-fourths of all of the royalty payments, theretofore paid, upon the purchase price of said mining claims.

(Tr. p. 25.)

That at the time the notice of exercise of the option was served on Humphrey and others mentioned, the Mount Gaines Mining Company had paid to J. W. Humphrey and the California Pacific Title and Trust Company the sum of $17,418.48 in royalties.

That the amount to be applied on the purchase price on said date, to-wit, 75% of the above amount, was $13,063.86; $10,000.00 to be applied on the first payment and the remainder to be applied on the next payment coming due six months thereafter. The California Pacific Title & Trust Company, by its letter dated June 9, 1937, refused to apply any of the royalty payments upon the first payment or the purchase price.

(Ex. "C", Tr. p. 26.)

That from May 25, 1937, until August 28, 1939, the Mount Gaines Mining Company paid the additional sum of $49,532.89 in royalties to the California Pacifiic Title & Trust Company, making the total payments of royalties as of said date, August 28, 1939, the sum of $66,951.69.

That under the direction of the notice of May 25, 1937, to apply three-fourths of all royalties paid in upon the purchase price of the undivided three-fourths interest of the mining claims set out in the lease and option, it would have made the amount paid upon three-fourths interest $50,213.53, being an overpayment of $213.53.

That since the 28th day of August, 1939, the said Mount Gaines Mining Company became, and was, the owner of an undivided three-fourths interest in all of the mining claims mentioned in the lease and option. The petition sets out that the Trustee continued to make payments from August 29, 1939, until the time of filing the petition in the District Court, amounting to the sum of $26,199.64, and that there is due and owing to the Trustee the sum of $26,199.64 on account of overpayments made to the California Pacific Title & Trust Company and the Title Insurance and Guaranty Company for their beneficiaries and that the same has not been paid nor any part thereof.

Motions were made by the respondents to dismiss the action upon various grounds, want of jurisdiction in the Court to hear and determine the matter and to dismiss said petition and proceedings based thereon, "on the ground that said petition fails to state a claim upon which any relief can be granted against this respondent."

(Motion of Respondent, Title Insurance & Guaranty Company, Tr. pp. 29-30.)

(Motion of Respondent, California Pacific Title & Trust Company, Tr. pp. 37-38.)

The petition and motions present a question of law in a controversy arising over the ownership of three-fourths interest in the mining claims set out in the lease and option, as appears from the copy of the lease and option attached to the petition herein; the said property being property in the custody and control of the United States District Court for the District of Nevada. That Court had exclusive jurisdiction over the debtors, Mount Gaines Mining Company and its property wherever located by virtue of Chapter X, Corporate Reorganization, U.S.C.A. Title 11, Section 511, U.S.C., Title 1-16, Section 511.

The Court rendered its decision on the motions on the 25th day of September, 1942, and granted the motions to dismiss without prejudice. The Order was entered in the minutes of the Court on the same day.

(Tr. pp. 45-53.)

The Notice of Appeal was filed September 25, 1942. The Transcript of Record on Appeal was filed by the Clerk of this Court on December 23, 1942, and the printed record was filed within the time required by law and the rules of this Court.

The statutory provisions believed to sustain the jurisdiction of this Court are Section 24 of the Bankruptcy Act, Section 47, U.S.C., Title 1-16, Section 47, U.S.C.A., Title 11.

STATEMENT OF THE CASE.

This is an appeal from an order in the District Court of the United States, in and for the District

of Nevada, duly made and entered on the 25th day of September, 1942, granting a motion to dismiss, and dismissing, proceedings instituted by the Trustee for the debtor corporations.

(Tr. p. 45.)

On the 16th day of December, 1933, J. W. Humphrey, the owner of certain mining claims situate in Mariposa County, State of California, made and executed a lease and option to Carl W. Yates and J. E. Binns of Los Angeles, California, for the said mining claims known as the Mount Gaines.

(Tr. p. 19.)

This lease and option was assigned to the Mount Gaines Mining Company on the 1st day of December, 1934.

(Tr. pp. 5-6.)

The lease and option required: "That Lessees shall perform at least fifty (50) shifts of mine work in rehabilitation of said mine, or exploration, exploitation, development and improvement of said mine as shall be such as is necessary in good mining; and in the second calendar month and each following calendar month thereafter shall perform at least ninety (90) shifts per month."

"That Lessees shall pay as a royalty to the Owner ten per cent (10%) of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns on bullion. Said royalty payments to be considered as a rental only, and all such payments to be made in and through the

Security First National Bank of Los Angeles, California."

(Tr. p. 20.)

"That all payments shall be made and accompanied by a duplicate copy of such returns, not later than the 25th day of following calendar month; and that upon said 25th day Lessees shall make in writing a full report of all operations, developments, and exposures of moment."

(Tr. p. 21.)

The lease and option further required: "That the Lessees shall pay and discharge when due and when delinquent all taxes hereinafter accruing against the Mine and its improvements and shall do all assessment work as required by law, make the necessary affidavits and record the same at their own expense."

"That said Lessees shall use all diligence in the protection and continuity of title of all present existing mining, mineral locations, water and tailing rights and those that may legally accrue under the maintenance and operation of said Mine property at their own expense:"

"That the Lessees further agree that all equipment and improvements shall be then deemed affixed thereto and become a part of said Mine and subject to this lease and option:"

(Tr. p. 21.)

The lease and option further required: "That the Lessees shall carry legal compensation insurance on all men by them employed and shall keep complete

records of operations, accounts, mining maps and production. * * *"

"It is further agreed that any contiguous mining ground that can and may be located and any water or water rights that may be denounced or in any wise acquired for use of operations of said Mine or mill, shall forthwith become the property of said Mine and the Owner thereof and included in this lease and option."

(Tr. p. 22.)

The option, the cause of the controversy in this matter, is as follows:

> "Said owner, for and by the considerations and agreements herein therefore grants unto the Lessees an option to purchase an undivided three-fourths (¾) interest in said mine, property and all appurtenances thereof for the sum of Fifty Thousand Dollars ($50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars ($10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars ($10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars ($50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of

> the said three-fourth (¾) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned."
>
> (Tr. p. 23.)

On May 25, 1937, the Mount Gaines Mining Company notified C. F. Humphrey, W. H. Holcomb, Harry Lee Jones and the California Pacific Title & Trust Company, Trustee, by its written notice, "hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement"; and made a demand upon them that the said owners apply three-fourths of the royalties, claiming that three-fourths of the royalties amounted to over $10,000.00 and demanded that they be applied upon the first payment upon the purchase price.

(Ex. B, Tr. p. 25.)

As a matter of fact, the petition shows that at the time the notice was served, the Mount Gaines Mining Company had actually paid in royalties, $17,418.48, and that three-fourths of that amount was $13,063.86 that could be applied upon the purchase price.

(Tr. p. 7.)

The California Pacific Title & Trust Company was the only one that answered the notice and they refused to apply the royalties upon the first payment and claimed that the notice did not constitute an elec-

tion to exercise the option for the reason that the sum of $10,000.00 did not accompany the notice.

(Ex. C, Tr. pp. 26-27.)

Motions challenging the jurisdiction of the Court to hear the case and motions challenging the jurisdiction of the Court over the defendants were also made but the decision of the Court dismissing the case was made solely upon its opinion that the option had not been exercised for the failure to make the $10,000.00 payment.

(Opinion of Court, Tr. p. 46.)

The conclusions of the Court are embodied in the last two paragraphs of the Court's opinion.

> "The express language of the lease and option agreement leaves no basis for an interpretation that the said payments, made prior to election to exercise the option, specifically declared 'to be considered as rental only' may, by such mere declaration of exercise of option, be so changed in character that three-fourths of the amount thereof, theretofore paid, ceases to be 'rental only', as expressly designated in the agreement, but the property of the lessee and optionee and applicable, if sufficient in amount, to payment not only of the first installment but that of any or all the others."

> "The said Debtor, not having tendered a cash payment of the full amount of the first installment of the total option purchase price, at the time of giving written notice of the claimed exercise of such option, such option has not as yet been complied with and the Trustee is not entitled

to the relief prayed for in his petition. James on Option Contracts Secs. 813-817; 35 C. J. 1038-1042, secs. 181-187."

"The motions to dismiss are granted without prejudice."

(Tr. pp. 52-53.)

From the Court's opinion it appears and is fairly deducible from it that before the option could be exercised:

a. That it is necessary that a payment of $10,-000.00 in cash accompany the notice of the exercise of the option.

b. That the failure to make such payment released the owners of any obligation to apply three-fourths of the royalties heretofore paid them on the purchase price of the mining property.

c. After the first installment is paid in cash the 75% of the said royalty payments are to be credited upon the ensuing purchase price installments as they fall due and not as rental only.

d. That all payments of royalties and rentals paid prior to the notice of the exercise of the option could not be applied upon the purchase price.

ARGUMENT.

There are only two questions involved in this appeal:

1. Was the option, embodied in the lease, exercised by the notice of May 25, 1937?

2. If the option was exercised was the appellant entitled to have 75% of the royalties that had been paid applied upon the purchase price of the property and on the first installment?

The option has two clauses. The first one provides for a privilege, to be exercised at any time during the life of the lease, to purchase a three-fourths interest, "in the mine property and all appurtenances thereof", for the sum of $50,000.00, provided the lease shall be in force and effect. Said purchase price shall be payable as follows: "$10,000.00 to be paid in cash *at the time of notice to the first party of the exercising of said option to purchase* and a like sum of $10,000.00 to be paid on or before the expiration of each and every period of six calendar months thereafter until said purchase price of $50,000.00 shall be fully paid.

The second clause of the option provides: "It is further agreed that 75% of the royalty and *rental* payments paid under this lease shall be applied and credited upon the purchase price of said three-fourths interest in said property herein provided to be sold *in event second parties exercise said option and purchase said property hereunder.*" It is this last clause upon which the appellants herein claim the right to have the rentals and royalties heretofore paid applied upon the purchase price and requested to have applied upon the first installment of $10,000.00.

The only qualification required by that clause to have the royalties and rentals applied upon the pur-

chase price was, "in event the second parties exercise said option and purchase said property hereunder".

The option granted by the owners of the property to the lessees was a part of the lease given by the owner of the Mount Gaines Mine to Yates and Binns and dated December, 1933, and assigned to the Mount Gaines Mining Company.

The option was granted on account of the agreements contained in the lease and is supported by a valuable consideration, that is, "the payment of 10% of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns on bullion"; "the doing of at least 90 shifts of work per month"; "pay and discharge when due and when delinquent all taxes accruing on the mine and its improvements and shall do all assessment work as required by law"; "use all diligence in the protection and continuity of title of all present existing mining, mineral locations, water and tailing rights, and those that may legally accrue under the maintenance and operation of said mine property"; "that any contiguous mining ground that can and may be located and any water or water rights that may be denounced or in any wise acquired for use of operations of said Mine or mill, shall forthwith become the property of said Mine and the Owner thereof and included in this lease and option:"; all this at the expense of the lessees; "that all equipment and improvements shall be then deemed affixed to

the mine and become a part of said mine and subject to this lease and option".

(Tr. pp. 20-21-22.)

The option, by providing the royalties and rentals paid to the lessor, or the owners, could be applied upon the purchase price, gave the lessees a continuing interest in 75% of that fund and, in fact, created a right to that fund if the lessees exercised the option and assume the liability to pay $50,000.00 for the three-fourths interest.

The notice of the exercise of the option, "hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement", changed that option into an agreement of sale on the part of the lessor and an agreement to purchase upon the part of the lessee and created a liability against the lessee of $50,000.00.

(Tr. p. 25.)

> "The option had at least the force of an offer to sell, and the acceptance of this offer before it had expired or had been revoked constituted a valid and binding contract from which neither party could recede."
>
> *Smith v. Bangham,* 156 Cal. page 363.

> "Such an unqualified and unconditional acceptance creates a contract of purchase and sale, in which an action for specific performance will lie. Such contract is enforceable in equity, as a written contract embodying the same terms, and subscribed by the seller and purchaser, would be enforced."
>
> *Horgan, et als., v. Russell,* 43 L.R.A. (NS) p. 1150;

Turner v. McCormick, 67 L.R.A. p. 853;
Johnson v. Trippe, 33 Fed. p. 530;
W. G. Reese Co. v. House, 162 Cal. p. 740;
Pollock, et als., v. Brookover, 6 L.R.A. (NS) p. 403.

It was that clause of the option which permitted them to apply 75% of the royalties and rentals on the purchase price that gave them a right to protect themselves in the investment of their money in improvements, mills, equipment and other appliances used either in the development or exploitation of the mines and it must certainly have been a great inducement to the lessees to accept and sign a written lease that obligated them to the extent which the lease did in this case.

The condition attached to the option for the right to have the royalties and rentals paid applied upon the purchase price is set out in the option as, "in event second parties exercise said option and purchase said property hereunder". It is the contention of the appellant herein that the notice served of the exercise of the option became an agreement of sale and purchase and a debt or liability on the part of the appellant in favor of the owners of the property. That agreement made the appellant the equitable owner of all of the mining claims.

Equity regards that as done which ought to be done.

The agreement of sale and purchase made the lessor the vendor and the lessee the vendee under the contract. While the law would regard the vendor as

still the legal owner of the land, equity applied a different rule and the maxim, "equity regards and treats that as done which in good conscience ought to be done" comes into play.

> "Effect of an Executory Contract in Equity.—The full significance of the principle that equity regards and treats as done what ought to be done throughout the whole scope of its effects upon equity jurisprudence is disclosed in the clearest light by the manner in which equity deals with executory contracts for the sale of land or chattels which presents such a striking and complete contrast with the legal method above described. While the legal relations between the two contracting parties are wholly personal,—things in action,—equity views all these relations from a very different standpoint. In some respects, and for some purposes, the contract is executory in equity as well as at law; but so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. By the terms of the contract the land ought to be conveyed to the vendee, and the purchase price ought to be transferred to the vendor; equity therefore regards these as done: the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as the owner of the land; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all

the beneficial interest has passed, having a lien on the land, even if in possession of the vendee, as security for any unpaid portion of the purchase-money."

Pomeroy's Equity Jurisprudence, Fourth Edition, Section 368, page 685.

"This principle, so brief in its statement, is most broad in its application, and fruitful in its results; from it, as the root, spring a large part of the rules which make up the body of equitable jurisprudence. Apply the principle to the present case. By the terms of the contract, the land ought to be conveyed to the vendee, and the purchase-money ought to be transferred to the vendor; equity, therefore, regards these as done —the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as owner of the land; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee to whom all the beneficial interest has passed."

Pomeroy on Contracts, Specific Performance, Second Edition, Section 314, page 400.

The intention of the parties must control the construction to be given to the contract; and this intention is to be found in the lease and option. But in construing the contract the Court has no right to disregard one of its clauses in favor of another clause. Both clauses should be given effect, if they are not

repugnant; and the intention of the parties must be gathered from the entire instrument. In this case, the contract includes the lease and the option; but the option, being special, must first be consulted as to what the intentions of the parties were.

It is to be noticed that in the option it states,

> "Said owner for and by the considerations and agreements herein therefore grants unto the lessee an option to purchase an undivided three-fourths interest in said mine and property and all appurtenances thereto for the sum of $50,000.00 at any time within the period of this lease or any extension thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: $10,000.00 to be paid in cash at the time of notice to the first party of the exercising of said option to purchase and a like sum of $10,000.00 to be paid on or before the expiration of every six calendar months thereafter until said purchase price of $50,000.00 shall be paid."

That clause is general in its nature and permits the lessee to pay the entire $50,000.00 at any time during the life of the lease or to pay it in installments of $10,000.00 every six months. It also has the effect of fixing the time when these payments begin to run. That is to say, they commence at the time of notice to the first party of the exercise of said option to purchase. That clause has a dual effect. It changes the option into an agreement of sale and purchase and creates a debt of $50,000.00 due from the lessee to the lessor, $10,000.00 of which debt becomes immediately due and payable.

The second clause in the option states:

> "*It is further agreed* that 75% of the royalty and rental payments paid under this lease shall be applied and credited upon the purchase price of said three-fourths interest."

This is a right granted to the lessee to have 75% of monies already paid to the lessors applied upon the purchase price. There is no limitation in that clause. When it speaks of purchase price it means $50,000.00 and it does not exclude in any way the application of that money upon the first installment. To do so it would be necessary to insert in that agreement an exception that the royalty and rental payments could not be applied upon the first installment or appropriate words to that effect.

To give effect to the Court's opinion or order it would make 75% of the royalties and rentals that had been paid to be applied only upon four-fifths of the purchase price. It would be more in consonance with the intention of the parties to hold that 75% of the royalties theretofore paid should amount to $10,000.00 or if it be less than that amount that the lessee would have to pay a sufficient amount when taken with the 75% of the royalties would make the first installment of $10,000.00. All that the lessor could claim in view of that option as a whole was that he was entitled to $10,000.00 on the first installment either from the royalties or the lessees or both but the first payment should be $10,000.00. (In other words, if 75% of the royalties and rentals did not amount to the full sum of $10,000.00 the lessee would have to make up the difference.)

Further, the expression in the clause of the option:

> "and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the installment herein mentioned."

simply continues in force that portion of the lease which requires the royalties to be paid on the 25th day of the month following the month in which the ores had been sold. When such royalties are paid they shall then be credited upon the installment next payable regardless of the six months clause in the first clause of the option. In other words, prevented the lessee from holding back 75% of the royalties and pay that in under the six months clause.

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
>
> *Cal. C. C.* Section 1641.

> "In construing written instruments, the only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it."
>
> *Walsh v. Hill,* 38 Cal. 482;
>
> *Barnett v. Barnett,* 104 Cal. 298.

> "Particular clauses of a contract are subordinate to its general intent."
>
> *Cal. C. C.* Section 1650.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Cal. C. C. Section 1636;

Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 238.

The following statement appears in the Court's decision:

"It is clear from a reading of the 'agreement of lease with option to purchase' that, if such option is not exercised or until it is exercised to the extent of first payment, the legal relationship of the parties continues only as that of lessor and lessee. Until there is 'notice' of exercise of the 'option to purchase', accompanied with 'cash' payment, of first installment, it is specifically provided that the 'royalty' payments of 'ten per cent (10%) of all production' are 'to be considered as rental only'. If the option is in part exercised, by the payment of one or more of the installment payments, 'as in the agreement of lease with option' provided, then, until final payment is made, 'seventy-five per cent (75%) of the royalties and rental payments * * * and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned'. The above quoted expression, 'royalties and rental payments', clearly refer to the preceding expression—'Lessees shall pay as a royalty to the Owner ten per cent (10%) of all production * * *. Said royalty payments to be considered as rental only, * * *'. After the first install-

ment is 'paid in cash', then 75% of the amount of said 'royalty payments' are to be credited upon the ensuing purchase price installment payments as they fall due, and not 'as rental only'."

(Tr. pp. 51-52.)

The answer to the above quoted statement of the Court is found in the lease and option itself. The option makes no distinction between rentals and royalties but declares:

"It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth (¾) interest * * *"

(Tr. p. 23.)

The further statement of the Court,

"After the first installment is 'paid in cash', then 75% of the amount of said 'royalty payments' are to be credited upon the ensuing purchase price installment payments as they fall due, and not 'as rental only'."

(Tr. p. 52.)

is not supported by the option nor the lease. The only requirement as appears in the option is in the first clause:

"Said purchase price shall be payable as follows: Ten Thousand Dollars ($10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase"

(Tr. p. 23.)

that uses the statement, "purchase price". There is no purchase price until the option is exercised and the purchase price is $50,000.00 and the first installment of the purchase price is made payable at the time of notice to the first party.

Further, as it is expressed in the opinion, the Court required that $10,000.00 accompany the notice of the exercise of the option before the option could be exercised. Evidently the Court considered the payment of the money to be the exercise of the option or that the payment of the money was necessary to the exercising of the option. This is not supported by the authorities heretofore cited in this brief and, further, the intention of the parties at the time the lease was signed shows that that was not their intention.

In the first clause of the option it provides that notice of the exercise of the option shall be given to the first party of the lease, the language used, being:

> "Ten Thousand Dollars ($10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase,"
> (Tr. p. 23.)

but the money was to be paid as appears from the following covenant:

> "It is agreed that in the event the Lessees exercising the before mentioned option to purchase, the payment shall be made in the Bank before mentioned herein and that the Owner shall upon notice of such tender of payment deposit in said Bank a good and sufficient deed of convey-

ance to the Optionees for the three-fourth (¾) interest."

(Tr. p. 24.)

It is clear from those two clauses that the notice of exercise of said option should go to the owner; payment of the money should be made to the Security First National Bank of Los Angeles; the notice to J. W. Humphrey at San Francisco, California; the money sent to Los Angeles.

Further, in that clause it uses the language:

"that in the event the Lessees exercising the before mentioned option to purchase, the payment shall be made * * *"

WHEREFORE, appellant prays that this Court reverse the Order of the District Court granting the motions of respondents to dismiss and dismissing the proceedings instituted by the Trustee.

Dated, Reno, Nevada,
February 5, 1943.

JAMES T. BOYD,
Attorney for Appellant.